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Issue Date: 17 March 2005

CASE NO.: 2004-LHC-1505

OWCP NO.: 08-118112

IN THE MATTER OF

MANUEL LOPEZ,
Claimant

v.

PORT CONTAINERS,
Employer

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier

APPEARANCES:

Harry C. Arthur, Esq.
On behalf of Claimant

John C. Elliott, Esq.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Manuel Lopez (Claimant) against Port Container Industries (Employer), and Liberty Mutual Insurance Company (Carrier). The formal hearing was conducted in Houston, Texas on November 18, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-12, 15, 16, 18, 19-24, 27, 28, and 29, and Employer's Exhibits 1-49. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Jurisdiction is a contested issue;
2. The date of injury/accident is disputed;
3. Whether the injury was in the course and scope of employment is disputed;
4. An employer/employee relationship existed at the time of the accident;
5. Employer was advised of the injury on September 23, 1997;
6. Notices of Controversion were filed June 19, 2000 and January 15, 2001 (amended);
7. An informal conference was held on November 5, 2003;
8. The average weekly wage at the time of injury is disputed;
9. Nature and extent of disability:
    (a) Temporary total disability is disputed;
    (b) Benefits have been paid: 292 3/7 weeks at $220.84 per week (total paid is $64,642.35);
    (c) Medical benefits have been paid (some);

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through February 17, 2005.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

10. Permanent disability and impairment rating is disputed; and
12. Date of maximum medical improvement is disputed.

Issues

The unresolved issues in this proceeding are:

1. Nature and Extent of Disability;
2. Unauthorized medicals;
3. Causation, specifically of Claimant's complaint of cough;
4. Jurisdiction;
5. Average Weekly Wage;
6. Suitable alternative employment;
7. Wage earning capacity;
8. Maximum medical improvement;
9. Payment of unpaid medical expenses and mileage; and
6. Attorney fees, penalties, interest and expenses.

Statement of the Evidence

Manuel Lopez

Claimant testified through an interpreter that he is 59 years old and was born in Monterrey, Mexico. He is married and has four children. Claimant and his wife currently live with one of their sons and his family in Houston, Texas. Claimant finished preparatory school in Mexico and attended secondary school up to the ninth grade. He then obtained some vocational training, learning some maintenance and electrical skills, but he stopped attending vocational school and began driving trucks.

Claimant came to the United States while he was in his late 20s and became a citizen in 1997. He began working as a machine repairman for Super Lopez Tortilla Factory in 1990 and worked there until he was laid off in 1997. He next worked for Continental Construction Company, driving tractors for approximately eight months, earning eight dollars per hour. Claimant's employment with Continental ended when the company closed, and he was briefly unemployed until he secured a position at Ridgeway Cartage which paid seven or eight dollars per hour. He quickly left Ridgeway to work for Employer when he learned that Employer paid higher wages. Claimant testified that he put in an application for a driver position and got the job.

Claimant described the day his accident happened. He arrived at 7:00 a.m. and waited for the supervisor to tell him where to go. He said that day, September 23, 1997, he was instructed to go to dock 32. Claimant drove one of the empty eighteen-wheeler trucks to the dock where there were other trucks loaded with material from the ship that needed to be driven to the yard. Claimant explained that while one truck was being loaded, empty trucks would line up behind it to be loaded. He said that he left the empty truck he had driven down, put the chains on a loaded truck to secure the pipes that it was carrying, and took the loaded truck back to the yard. Claimant stated he had completed two of these load/unload cycles that morning before he was injured.

Claimant testified that when he went on his third load/unload cycle that morning, he noticed that the pipes on the truck were crossed. He opined that when the pipes were unloaded one of the straps used to lower them was probably loose, therefore causing the pipes to twist. Claimant stated that he used the forklift that was at the location to lift the pipes up. Then, in an attempt to put a strap around the pipes to straighten them, he climbed onto the roof of the forklift, but was only able to get as far as the blades of the forklift and then he fell while holding the strap in his hand. He said that he slipped backwards and fell approximately eight to ten feet, first hitting the tires of the forklift and then the ground. Claimant testified that somehow he managed to put the chains on the truck and drive it to the yard. When he got out of the truck, he vomited, and three to five minutes later his supervisor, Mr. Joel Ramirez arrived.

Claimant stated that he told Mr. Ramirez that he had fallen and then went to the office and "reported it to the young fellow" there. Claimant said at that time, his hands, left knee, and the back of his neck were bothering him and his hands were bleeding. Claimant said that at the office there was a woman who spoke Spanish who told him to go see a doctor. Claimant then drove himself fifteen or twenty minutes to see Dr. Abiel Garcia who gave him "an injection" for his pain, medicine to lessen the swelling in his knee, and ordered x-rays.

Claimant recalled that Dr. Garcia sent him to another doctor regarding his knee and back. He had surgery on his left knee and stated he was told this was to treat "broken tendons." Claimant said that he eventually stopped seeing Dr. Garcia because he was told that the insurance company would no longer pay for Dr. Garcia's treatment. Thereafter, Claimant saw Dr. Guerrero.

Claimant has undergone two knee surgeries. He recalled that after his first knee surgery, he was not able to straighten his left knee. He also said that since that surgery, he has experienced problems with his throat, that the doctor said would go away with time but have continued. When he talks, he coughs, and he has problems swallowing and eating. Claimant had a second surgery on his left knee, after which he could straighten his leg. His knee has improved since the second surgery, but he has no strength in his knee.

Claimant saw Dr. McDonald for treatment of his back. He said that Dr. McDonald told him that the discs at levels four and five had been affected and suggested that Claimant undergo back surgery. Claimant elected not to have the operation, because Dr. McDonald told him that there was a fifty percent chance he would be better, and an equal chance of not getting better. Claimant is "afraid" to have the surgery.

Claimant has not worked since his injury. He said that Dr. Guerrero has not told him he can return to work, but he has attempted to find employment. He was given a list of potential employers by William Quintanilla and contacted several places and personally filled out applications at others, but with no results. Claimant testified that he feels "very depressed' about not working, because he has always worked. Claimant explained that he wants to work, but he wants to get well first. He did not believe he was capable of working as a courier because of the required lifting, nor did he think that he would be able to drive all day. Claimant said that if he sits for a long time, his hands "start to go red" and part "goes black." He is able to drive his car, and does so frequently, but said that he cannot drive long distances.

Claimant is not presently under a physician's care, and estimated that it had been several months since he had seen Dr. Guerrero. He explained that he used to see Dr. Guerrero once per month, but the insurance company is not paying him anymore, and said that Dr. Guerrero told Claimant that he could not treat him anymore unless Claimant paid for the visits.

On cross-examination, Claimant testified that at the site of Employer's location, there are two roads which run along the port: the upper level road, which is back where Employer's yard is located, and the lower road which is by the navigable water where ships are loaded and unloaded. Claimant was shown a photograph which he identified as Employer's office. The layout of the area appears to be the water, then the docks and the lower level road altogether, and

then after the lower level road, there are a few buildings and an athletic or exercise track which separate the lower road from the upper road.

Claimant admitted that in his deposition he stated that the accident had occurred on the dock, while a form contained in Employer's Exhibit 2 states the exact location of the accident as "upper level road, CD 23, Port of Houston, Galena Park, Texas." Claimant testified that he did not know who completed this form, though he identified his signature on it. Claimant said that when he reported the accident, he spoke to Trevyn Smith. Claimant said that there were two women in the office with Mr. Smith. Claimant was shown a copy of the accident report, dated September 23, 1997 which stated the location of the accident was the yard. Claimant stated that he did not know who wrote "yard," or who completed the report.

Claimant was shown portions of a surveillance video, which is located at EX 39 and EX 40. The video shows that Claimant is not using a cane nor wearing his back brace. Claimant explained that he does not usually use his cane when walking short distances. The video shows that Claimant went to Elizade tire shop around 9:30 in the morning. Claimant agreed that the film showed him standing around conversing with employees, and that he stood there for the better part of the day. Claimant was asked if he wore his back brace when he went to see Dr. Hamer, the pulmonologist. Claimant said he did not, but was then shown video of him getting out of his car and putting the brace on in the parking lot before he went into Dr. Hamer's office. He also explained that he used the cane because it was a long walk from the car to the office. Claimant acknowledged removing his back brace upon returning to the car.

When asked if he had any problems with his hands, he stated "I don't have strength." Claimant was asked if he agreed with Dr. Guerrero's opinion that there was nothing wrong with his wrist. He replied that his wrists go numb and he loses strength. He did agree that he was able to sit and stand at will. Claimant denied having symptom magnification, despite Dr. Osborne's findings to the contrary.

Claimant recalled that when Employer was busy, he sometimes worked seven days per week. He said if business was slow, employees would only work forty hours. He clarified his work experience, stating that he was a machine repairman at Super Lopez Tortilla Factory, worked as an electrician's helper, and cleaned at Reyes Lumber.

On redirect, Claimant said that the forklift from which he fell was located on the lower road at the port. He agreed that Claimant's Exhibit 13, page three, showed the position the forklift was in relative to the truck when he fell, because he had pulled it up to the side of the trailer, had the forklift blades under the pipe and had lifted up the pipes. Claimant estimated that the boat was between twenty-five and thirty feet away from him when he fell.

On recross, Claimant clarified that when he said the forklift was located on the lower road when he fell, he was referring to where the accident occurred. He stated that Employer's offices are not located on the docks, but every dock has a small office. He was asked about his deposition testimony wherein he stated that the forklift was on the dock and explained that he refers to "the whole bottom part" as "the dock."

Wallace Stanfill, M.Ed., L.P.C.

Mr. Stanfill is a vocational rehabilitation counselor, is the owner of Comprehensive Rehabilitation Services in Houston, and testified at the hearing. Mr. Stanfill met with Claimant on October 11, 2004 after conducting a vocational assessment, including a review of Claimant's medical records and wages. He interviewed Claimant to obtain additional information such as work history, social background, educational history, medical status and current functioning. Mr. Stanfill's assessment is located at Claimant's Exhibit 3. After gathering this information, Mr. Stanfill was not able to develop a vocational plan. He testified that he felt further vocational rehabilitation was not practical in Claimant's case due to a combination of factors including his age, limited educational background, inability to communicate in English, lack of high school education, lack of transferable skills, and physical limitations. Mr. Stanfill testified that he has been performing vocational rehabilitation services for over twenty years and in his opinion, Claimant's was not a "desirable case."

Mr. Stanfill addressed a vocational report he had reviewed which was complied by Mr. William Quintanilla, a vocational expert hired by Employer. Mr. Stanfill testified that in the first report, Mr. Quintanilla was of the opinion that Claimant could function at the light physical demand level, but Mr. Stanfill did not see medical records which substantiated Mr. Quintanilla's opinion. He disagreed with jobs identified by Mr. Quintanilla which required light physical exertion, stating that assuming Claimant was capable of performing those jobs, Mr. Stanfill could not document the availability of any.

Mr. Quintanilla identified three particular jobs in his first report. Mr. Stanfill did not follow up on these positions, because they were temporary agencies or employment agencies which he does not consider a reliable source of information for labor market survey purposes because their employment opportunities are variable. He explained that such agencies may have a job one day and not the next. He gave an example of an agency in Mr. Quintanilla's second labor report which Mr. Stanfill did contact. He recalled that the company had three job openings which were all semiskilled to skilled occupations at the medium physical demand level, something he opined was clearly not suitable for Claimant.

Mr. Stanfill contacted other potential employers identified by Mr. Quintanilla's second report. RGG Services, a security guard company, said that non-English speakers were not appropriate for employment with their company. National Employment, an employment agency, required the ability to speak English, as did Pedus Services, who also required a high school education. Mr. Stanfill was of the opinion that Claimant has not been competitively employable since the date of his accident, September 23, 1997.

On cross-examination, Mr. Stanfill acknowledged that he usually gives more weight to the opinions of specialists than to those of family practice physicians. In response to Dr. Osborne's opinion that Claimant was capable of performing light level work, Mr. Stanfill stated that he questioned the word "light," because of its vague vocational meaning. He said that under the United States Department of Labor standards, "light" means maximum lifting of twenty pounds, frequent lifting of up to ten pounds, and walking and standing up to six hours in an eight hour work day. He explained that he questioned whether Dr. Osborne meant "light" as so defined, and questioned how to interpret such an opinion into a "vocationally-relevant" term.

Mr. Stanfill acknowledged that he had not reviewed Dr. Guerrero's deposition, so he was unaware whether Dr. Guerrero had changed his opinion regarding Claimant's ability to work. He agreed that his conclusion that Claimant was incapable of working was based in part on Dr. Guerrero's medical opinion that Claimant could not work. Mr. Stanfill stated that on April 6, 2004, Claimant applied for the jobs originally identified by Mr. Quintanilla on February 21, 2001. Mr. Stanfill agreed that jobs which had been identified in 2001 may not be available in 2004. Mr. Stanfill agreed that assuming Dr. Guerrero said that Claimant was capable of performing sedentary work, then sedentary jobs identified by Mr. Quintanilla would appear to fit in Claimant's physical restrictions.

If a general practitioner does not know or express an opinion regarding whether a claimant can perform job duties, and a specialist does have an opinion, Mr. Stanfill would generally assign more weight to the opinion of the specialist if the opinions were based on the same information. Mr. Stanfill acknowledged that he was not provided with either Dr. Guererro's deposition or the records of Dr. Parkinson. He was shown Dr. Parkinson's records and indicated that they stated Claimant was capable of light duty. He acknowledged that he had previously found suitable alternative employment for light-duty Spanish-speaking individuals, but stated that he had not found any sedentary jobs for such individuals.

Mr. Stanfill agreed that Claimant could perform sedentary work if Dr. Guerrero stated that Claimant could sit and stand at will, stand without the use of a cane, lift ten pounds, had no circulatory problems, no wrist problems, could bend down occasionally, no loss of blood circulation, no problem raising his arms, and no hand restrictions. He also agreed that all three jobs identified by Mr. Quintanilla in his first report were defined as sedentary.

On redirect, Mr. Stanfill stated that assuming Claimant was capable of performing light exertion as defined by the Department of Labor, he would be "hard-pressed" to identify suitable alternative employment in Houston. He explained that the combination of problems (age, inability to speak English, etc.) would make finding light employment difficult and sedentary "next to impossible." He stated that hypothetically, if something were available, a realistic wage would range from minimum wage to six dollars per hour.

Joel Ramirez

Mr. Ramirez also testified at the hearing. He currently works for Hussman Refrigeration, where he has been employed for about three and a half years. Prior to his present employment, he worked for Employer for close to twenty years. His most recent position with Employer was a "pusher," which he defined as a supervisor. Mr. Ramirez described his duties as making sure employees clocked in, sending them to the appropriate location and giving them their duties for the day.

Mr. Ramirez was working on September 23, 1997, the day of Claimant's accident, and Claimant was one of his employees. He stated that by that time, Claimant was a dock driver, which entailed taking empty trucks to the dock and bringing loaded trucks back to the yard. Mr. Ramirez explained that before leaving

the dock, a driver will put a chain around the load in the truck to secure it for transport to the yard. He estimated the storage yards to be approximately a mile from the dock. He said that sometimes the stevedore companies at the port would let Employer's workers use their tow motors, since Employer did not have any tow motors down by the dock.

Mr. Ramirez recalled learning of Claimant's accident at approximately 8:30 the morning of September 23, 1997. He was checking the yard and noticed that Claimant was hurt, but clarified that he did not see Claimant's accident. Claimant told him that he fell in his knee and his right hand. He said that Claimant was sent to the office and then went to the doctor.

Mr. Ramirez agreed that Claimant earned less when he worked for Ridgeway than he made working for Employer, but he did not know exactly what Employer paid Claimant. He said that during September 1997, there was one employee, Hector Casias, who had been working as a driver for over a year. He recalled during the period of September 1996 until September 1997, the employees sometimes worked overtime. He estimated that during a typical week, drivers worked an average of 55 hours per week. He assumed that Hector Casias earned between $7.00 and $7.50 per hour, but was not sure because no one ever told him what they earned. He stated that Employer did not pay employees overtime (time and a half) until they had worked for three months.

On cross-examination, Mr. Ramirez agreed that his wages would not be the same as Mr. Casias and Claimant's because he was a supervisor and they were drivers, and as a supervisor he earned more. He had not seen any records relating to Claimant's accident. Mr. Ramirez could not remember whether Claimant told him where the accident occurred. He stated that Employer's yard is on the upper level and the dock is on the lower level.

Mr. Ramirez was shown Employer's Exhibit 20 and asked what it listed as Claimant's occupation, to which he responded "yard man." He said that Employer employs both drivers and yard men. The yard men "do it all," including sometimes helping the forklift operators, cleaning up the yard when there was nothing else to do, and sometimes helping load and unload trucks. He stated "a yard man means labor," and labor can be used to drive the trucks.

On redirect, when asked who of Employer's workers would be considered laborers, Mr. Ramirez replied "everybody who [worked with him] on the yard, the dock," and explained that they "do everything," including loading the dock, doing

something in the yard if there is something to do there, clean the rail, etc. in order to make eight hours. He stated that yard men and drivers are not the same, but sometimes yard men drove. He testified that Claimant was a driver.

Trevyn Smith

Mr. Smith was another witness. He testified that he works as Employer's safety director and he held the position on September 23, 1997. He described his duties as consisting of handling accidents, injuries, and employee files. Mr. Smith was shown Employer's Exhibit 1 which he identified as a form bearing his signature. He said that the form indicated that Claimant's title was "yard help," and stated that it reflected his understanding of Claimant's position. The form indicated that Claimant worked on the yard, which was on the upper level road, and that was his understanding of where Claimant usually worked. Mr. Smith testified that Melissa Solise was an assistant of his at one time. He was shown Employer's Exhibit 20 which was completed by Ms. Solise on September 23, 1997. He agreed that the form stated that Claimant was a yard man and that the accident happened on the yard. Mr. Smith was shown photographs that he identified as the aerial view of Employer's office and warehouses. He said that in light of the records he had been shown, they indicated that Claimant's accident occurred at Employer's yard.

Mr. Smith stated that at the yard, Claimant would generally perform yard help, including cleaning up timbers, stripping pipe, blocking coil, and assist in the loading and unloading of vehicles. He said that to the best of his knowledge, Claimant did not normally go down to the lower level road where the docks were. He explained that Employer has a separate job application for drivers, and drivers' files are kept separate from the other employment files.

Mr. Smith testified that he knew he was not present the day of Claimant's accident because his wife was due to give birth on "the Monday or Tuesday of September around the 23rd or 22nd." He said that he took the whole week off work.[3] He said that he normally fills out all the workers' compensation forms, and in Claimant's case, Melissa Solise completed it. Finally, he stated that to the best of his knowledge, Claimant was paid straight time without time and a half.

On cross-examination, Mr. Smith stated that if Mr. Ramirez testified that Claimant was driving a truck on September 23, 2997, he had nothing to dispute that. When asked if Claimant could have been hired as a laborer and later started

[3] September 23, 1997 was a Tuesday.

driving, Mr. Smith replied that Claimant could have driven a dock truck, but not a road truck. He said the reason for separate applications for drivers and laborers is because drivers have to possess a commercial vehicle license and must provide their driving record, but he acknowledged that a worker did not even need a driver's license to drive a dock truck. On redirect, Mr. Smith estimated that as a yard man, less than five percent of Claimant's time would be spent driving at the docks compared to working on the yard.

Alma Balleza

Ms. Balleza testified at trial that she works for Carrier and her position is Senior Case Manager II. She stated that Carrier never authorized Dr. Guerrero under the Longshore Act as Claimant's treating physician. She acknowledged that Carrier has paid Dr. Guerrero's bills because under the Texas Workers Compensation claim, Dr. Guerrero was Claimant's choice of physician. She described the Texas Worker's Compensation process, explaining that Claimant first has to fill out a form which he submits to the workers compensation Commission and if they approve it, Carrier must pay Claimant's choice of physician. She stated that Carrier did not consent to or authorize Dr. Guerrero in any manner. She did not recall a request to the District Director that there be a change of physician under the Longshore Act. On cross-examination, Ms. Balleza stated that to her knowledge, Carrier was still paying for Claimant's medical treatment.

William L. Quintanilla, M.Ed., L.P.C.

Mr. Quintanilla testified by deposition on November 8, 2004, which is located at Employer's Exhibit 48. He testified that he is licensed in Texas as a rehabilitation counselor. Mr. Quintanilla testified that he was contacted to perform a vocational assessment evaluation of Claimant on January 22, 2001. He interviewed Claimant on January 30, 2001 and reviewed his medical records. Mr. Quintanilla issued his first report on February 21, 2001, (EX 41) and later issued a second report dated October 19, 2004 (EX 42).

Mr. Quintanilla summarized the medical records he reviewed in compiling his reports. He stated that Dr. Parkinson released Claimant to "light duty," which Mr. Quintanilla explained depends on the physician's definition of "light." He stated that Dr. Parkinson was not specific, but light duty according to the Department of Labor Dictionary of Occupational Titles would mean that Claimant's lifting would be restricted to up to twenty pounds occasionally and no repetitive lifting of over ten pounds. He would also be able to stand and walk up to

six hours per day. He noted that Dr. Dozier said that Claimant would be capable of performing at least sedentary work, with limitations in heavy lifting for an indefinite period of time. Mr. Quintanilla stated that the results of Claimant's FCE also indicated that he was capable of performing light duty work.

Mr. Quintanilla reviewed the reports and deposition of Dr. Osborne which he stated indicated that Claimant would be released to return to work in the sedentary to light duty capacity. Mr. Quintanilla stated that he understood that Dr. Guerrero was a family practitioner with no board certifications. He said that he would agree that usually a specialist's opinion is assigned more weight that that of a general practitioner.

Mr. Quintanilla testified that he was familiar with Mr. Stanfill, who used to work for him. He said that Mr. Stanfill had performed "hundreds"of labor market surveys for individuals like Claimant in order to find light duty work, and Mr. Quintanilla's opinion was that Mr. Stanfill was "one of the best" in identifying jobs and job placement, especially with regard to non-English speaking individuals. He testified that Mr. Stanfill had never refused to perform a labor market survey for someone like Claimant while in Mr. Quintanilla's employ.

Mr. Quintanilla said that in reviewing the depositions of physicians who had treated Claimant, he noted that they had been shown surveillance video. He said that Dr. Osborne was of the opinion that Claimant had been exaggerating his symptoms and felt that Claimant would be able to do at least sedentary or light work. He stated that Dr. Guerrero, after reviewing the video, was of the opinion that there "was something" that Claimant could do. Mr. Quintanilla's own opinion after watching the video was that it appeared that Claimant did not really need his back brace to correct any of his problems because he removed it shortly after leaving the doctor's office.

Mr. Guerrero's most recent report is dated November 1, 2004. A retroactive labor market survey was conducted which revealed six potential employment positions which Mr. Quintanilla states were available in the Houston area "during the period following June 15, 1998": Guardsmark, Inc., and ISSC had non-commissioned security guard positions, and ACCS had a non-commissioned security guard position and a lobby officer position. All three employers' position were classified at the "light" physical demand level. Guardsmark paid $7.00 to $8.00 per hour, ISSC paid $6.50 to $7.50 per hour, and ACCS paid "up to" $8.00 per hour. Mr. Quintanilla also identified assembly line worker positions at Express Personnel, and assembler positions at Burnett Personnel Services and Nesco.

These jobs were also classified at the light physical demand level. Express Personnel paid $7.00 to $7.25 per hour, Burnett Personnel Services paid $6.28 to $7.11 per hour, and Nesco paid $7.00 to $7.50 per hour. Mr. Quintanilla testified that the jobs were forty hours per week and that the positions adhered to Claimant's mental and physical capabilities.

A current labor market survey was also conducted on November 1, 2004 which identified four positions available in the Houston area. RGG Services had a non-commission security guard position which paid $6.50 per hour; Snap Shot Couriers had a "courier of small packages" position which paid forty to fifty-five percent commission, or $250 to $350 per week; Pedus Services had a non-commissioned security guard position which paid $8.00 per hour; and National Employment Services had a computer assembly and packaging position which required no experience and paid $7.00 to $7.25 per hour. All of these positions were classified as requiring a "light" physical demand level. Mr. Quintanilla testified that the positions were available on a forty-hour per week basis and were appropriate given Claimant's physical and mental capabilities.

Mr. Quintanilla's initial report is dated February 21, 2001 and identified three positions available at TPI Staffing, Pro Staff, and Ameritech Staffing. The positions all state "several positions available; product and location of job depends on contract….sedentary positions available." All involved assembling electronic equipment. TPI's position involved the assembly of computer parts, wiring, and quality control. Pro Staff's positions were in "manufacturing and distribution industry, mostly computer products." The positions paid $7.00 to $7.50 per hour, and Mr. Quintanilla testified that they were available forty hours per week. Mr. Quintanilla stated that the positions were appropriate for Claimant's physical and mental capabilities. He stated that the jobs were entry level, unskilled, and did not require "good" English communication skills.

Mr. Quintanilla testified that he had reviewed Mr. Stanfill's report wherein he criticized the jobs identified by Mr. Quintanilla, stating that the employers were placement or staffing agencies. Mr. Quintanilla stated that Mr. Stanfill was partially correct in that some of the positions available through these agencies could be temporary, but explained that employers are more frequently using staffing agencies in order to "try out" an employee for ninety days in order to determine if he should be offered full-time employment. He stated that if an individual is a good employee, he will often be offered full-time employment.

Mr. Quintanilla agreed that he could not state with certainty that the jobs he identified would not exclude Claimant from the possibility of employment because of his age and inability to speak English. Mr. Quintanilla stated that in his opinion, Claimant has a fairly decent education and is personable, but acknowledged that Claimant is not a skilled laborer and has no skills, though he stated that the positions he identified do not require any skills.

Mr. Quintanilla acknowledged that Dr. Guerrero treated Claimant for the longest period of time and also referred Claimant for an FCE in August 2002 which indicated that Claimant was limited to walking for twenty minutes, standing for thirty minutes, and sitting for no more than fifteen minutes; and Dr. Guerrero relied on these results in opining that Claimant was incapable of working. Claimant underwent another FCE requested by Dr. Dozier which revealed different results and led Dr. Dozier to believe that Claimant was capable of performing light duty rather than sedentary work. Mr. Quintanilla agreed that he assigned more weight to Dr. Dozier's opinion, but stated that he did not completely disregard Dr. Guerrero's findings. He stated that Dr. Guerrero later testified in his deposition that Claimant was capable of doing "something." Mr. Quintanilla agreed that the surveillance video is a "small snapshot" of Claimant's daily activities and that what is shown on the tape is not indicative of a permanent condition.

Regarding the specific positions he identified, Mr. Quintanilla stated that the security guard position would be appropriate for Claimant because he would be able to alternate sitting, walking and standing. He said that the assembler positions did not require any previous experience, but involved being taught how to assemble a computer and then repeating the process. The assembler positions also allowed workers to alternate sitting and standing. He agreed that under Dr. Guerrero's opinion, the position with the courier service was inappropriate for Claimant's lifting restrictions because it would require lifting up to twenty pounds.

Medical Evidence

Abiel Garcia, M.D.

Dr. Garcia's records are located at Employer's Exhibit 32 and Claimant's Exhibit 11. Dr. Garcia saw Claimant the date of his accident, September 23, 1997. The records indicate that Claimant had a superficial laceration on his left hand which was not bleeding. Claimant also had some tenderness in the posterior aspect of the neck and tenderness around his left ribs, diffuse tenderness over the lumbar spine, a small abrasion of the lateral aspect of the left knee with tenderness and

effusion (swelling), and painful and limited flexion of the left knee. Dr. Garcia prescribed ibuprofen and a knee brace and diagnosed Claimant with a hand contusion and laceration, lumbar spine sprain, knee contusion, rule out intra-articular injuries such as ligament tear, cervical spine sprain, and left ribs contusion.

On October 15, 1997, Claimant complained of pain in his left knee and left ribs. Dr. Garcia's diagnosis was left ribs contusion, lumbar spine contusion, and left knee menisci tear. Claimant was continued on ibuprofen, referred to an orthopedist, and kept off work. On November 6, 1997, Dr. Garcia's notes indicate that Claimant complained of pain in his left knee and lower back. He stated that an orthopedist evaluated Claimant and recommended arthroscopic surgery which Claimant did not want to undergo. Claimant was advised to start physical therapy and continue taking ibuprofen.

Claimant presented with the same complaints and similar treatment was continued by Dr. Garcia for several months. Dr. Garcia's next note is dated January 8, 1999 and states that he last saw Claimant on April 14, 1998. He said that Claimant had not followed up because he reported he had to leave the country for personal reasons. Claimant reported that he had seen orthopedist Dr. Rodriguez in May 1998 who recommended that Claimant have sacroiliac injections which Claimant did not do, nor did he attend an independent medical examination. Dr. Garcia diagnosed Claimant with persistent low back pain, lumbar spine disc herniation, and left knee pain. He prescribed ibuprofen, referred Claimant to the orthopedist, and kept him off work.

Dr. Garcia's last record is dated March 8, 1999 and stated that he did not feel Claimant had reached MMI as was determined by the Texas Worker's Compensation Commission's designated doctor, though he did agree with the impairment ratings. Dr. Garcia opined that Claimant required further treatment of his back before reaching MMI.

Jorge Guerrero, M.D.

Dr. Guerrero testified via deposition on September 1, 2004. His deposition and records comprise Claimant's Exhibit 2 and Employer's Exhibit 45. Dr. Guerrero testified that he does not possess any board certifications but is board-eligible.[4] Dr. Guerrero first saw Claimant on February 26, 1999.[5] Dr. Guerrero

[4] Dr. Guerrero's CV indicates that he completed residency training in family practice. CX 2, p.40.

stated that he could not remember why Claimant left Dr. Garcia and came under his care. He stated that he did not recall Claimant being referred to him by another physician, but he thinks a friend of Claimant's recommended him to Claimant. Dr. Guerrero stated that he had reviewed the records of physicians who had seen Claimant before he did, including Drs. Garcia, Parkinson, and Dozier. He said that all of those physicians said that Claimant was capable of performing some type of work, but he disagreed because he had examined Claimant subsequent to them rendering their opinions.

Dr. Guerrero testified that Claimant's date of maximum medical improvement (MMI) should not be March 27, 1998, as indicated by Dr. Dozier, but at least June 8, 1998, (the date of Dr. Dozier's IME). Dr. Guerrero agreed that Claimant could do "some duty at that time." (EX 45, p.16). Dr. Guerrero defined "symptom magnification," which Dr. Dozier attributed to Claimant, as "an exaggeration of symptoms." He testified that he had never seen Claimant outside of his clinical office examinations. He stated that Claimant presented himself with a cane at examinations.

Claimant had a second arthroscopic surgery performed on his knee on October 19, 1999.[6] Dr. Guerrero stated that this surgery would have likely precluded Claimant from sedentary employment, but the duration of removal would have depended on Claimant's recovery time, which he estimated at three to six months. He noted that Claimant has not had any back surgeries performed. EX 45, p. 20.

Dr. Guerrero testified that Claimant had complained of a cough to him and Dr. Guerrero treated him with antitussives and anti-inflammatories. He opined that the treatment did "not really" help Claimant so he referred Claimant to a specialist. Dr. Guerrero's opinion was that the cough was an irritation of the intubation Claimant underwent during his second knee surgery. The cough presented itself when Claimant attempts to "talk a little bit faster or gets a little excited," but is constant and subtle, as opposed to when Claimant has to speak a great deal and he coughs "a lot."

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[5] Dr. Guerrero testified that he might have seen Claimant since 1997 as a "regular patient" but for the case related to the accident, he has seen him since February 26, 1999.

[6] Claimant's first knee surgery was performed by Dr. Parkinson on December 15, 1997, before Claimant was under Dr. Guerrero's care.

Dr. Guerrero was shown surveillance video of Claimant which portrays him walking, driving, and visiting with friends. After viewing the video, Dr. Guerrero stated "there might be something he could do." EX 45, p. 25. When asked if he meant sedentary or light duty, Dr. Guerrero replied: "Yeah. Sit there and answer phones maybe." He was uncertain whether Claimant was capable of driving longer than ten to fifteen minutes because of his back problems. He stated he did not know whether Claimant was capable of working in a guard shack if he was able to sit and stand at will.

Dr. Guerrero testified that he found no problems with Claimant's circulation or his wrists, there was no "blood obstruction" as Claimant had once indicated, and opined that Claimant could bend, squat and grip but not on a repetitive basis. He saw no problem with regard to Claimant raising his arms. He did not want Claimant using any machinery which was operated with foot pedals because of Claimant's back instability. Dr. Guerrero said that Claimant can stand without the use of a cane, can stand and sit at will, and has no cardiac problems of which Dr. Guerrero was aware. EX 45, p. 27.

Dr. Guerrero did not disagree with the results of the FCE which indicated that Claimant was capable of lifting ten pounds. He stated that he did not approve of Claimant climbing ladders or stairways. He opined that Claimant was not capable of kneeling. Dr. Guerrero stated that Claimant was possibly able to reach or work above his shoulder. He was of the opinion that Claimant suffered from severe depression. EX 45, p. 29. Dr. Guerrero testified that he believed that even if Claimant could perform a job which adhered to these restrictions, he did not think Claimant was capable of working eight hours per day. He could not give an exact number of hours that he deemed appropriate, but said that it would depend on the job.

Dr. Guerrero said that if Claimant had a job where he was able to sit and stand at will, his opinion was that Claimant would be able to stand for twenty to thirty minutes before he experienced pain. Dr. Guerrero agreed that if Claimant is able to sit and stand at will at home, then he could do the same at a light-duty job, if he was able to do so without experiencing pain. He stated that the decision regarding work was for Claimant to make, and if Claimant stated he was capable, Dr. Guerrero would not disagree.

On cross-examination, Dr. Guerrero opined that Claimant is still in need of medical treatment, specifically, he needs stabilization to his lower back in the form of spinal surgery. EX 45, p. 34. Assuming that Claimant declines the surgery, Dr.

Guerrero believes that Claimant still needs monitoring of his condition and medication to treat his pain. Dr. Guerrero has prescribed Claimant anti-inflammatories, muscle relaxers, and pain medication. It is his understanding that Carrier is refusing to pay for Claimant's Naproxen, Darvocet and Robaxin. He did not agree with Dr. Dozier's opinion that Claimant only needed over-the-counter medication. He also disagreed with Dr. Dozier's opinion that aside from spinal surgery, Claimant needed no further medical care.

Dr. Guerrero clarified the MMI date of June 8, 1998 that was found in his records. He stated that the date pertained to Claimant's left knee and Dr. Guerrero changed his opinion after he began treating Claimant's back problems. Dr. Guerrero testified that Claimant's second knee surgery of November 9, 1999 was related to his original injury and agreed that his needing further surgery would imply that he had not reached MMI. Dr. Guerrero explained that even if Claimant elects not to have back surgery, he has not reached MMI because Dr. Guerrero believed that there were things aside from surgery that could be done. EX 45, p. 37.

Dr. Guerrero referred Claimant to Dr. McDonnell, an orthopedic surgeon, in July 2002, whose opinion was that Claimant was a candidate for lumbar surgery but wanted him to be cleared by an ENT physician because Claimant's cough was apparently related to an intubation and would be very disruptive after lumbar surgery. Dr. Guerrero stated that he sent Claimant for an MRI, recommended by Dr. McDonnell, which revealed a three to four millimeter diffused protruded disc at L4-L5 which was putting pressure on and enclosing the exit of the nerve root. EX 45, p. 41. On redirect, Dr. Guerrero acknowledged that he was aware of Claimant's cervical and lumbar complaints at the time he placed Claimant at MMI on June 8, 1998, and that he had referred Claimant to have an MRI of the lumbar spine in April 1998.

Dr. Guerrero's records include periodic correspondence to the Texas Worker's Compensation Commission wherein Dr. Guerrero excused Claimant from work. He wrote these letters keeping Claimant off work for three months at a time, from March 1, 2000 until the last letter, written on October 29, 2004. (CX 2, p.19). Most of Dr. Guerrero's records consistently state that Claimant's progress was guarded and his compliance had been good. The records indicate that Claimant's complaints of back and knee pain were consistent. Dr. Guerrero treated Claimant with medications and referrals to pain management and specialists.

A memorandum dated August 23, 2004, contains Dr. Guerrero's disagreements with Dr. Dozier's assessment of Claimant. Dr. Dozier was contacted by Carrier to examine Claimant and did so on three occasions. Dr. Guerrero specifically disagreed with Dr. Dozier's opinion that Claimant's symptoms were exaggerated by his gross degree of symptom magnification. Dr. Guerrero indicated that he had treated Claimant for four years and opined that Claimant was still suffering from the effects of his 1997 injury. Dr. Guerrero also stated that the prescriptions he had provided Claimant were appropriate to treat his medical condition. Dr. Dozier dismissed the suggestion that Claimant undergo spinal surgery, but Dr. Guerrero noted that he, as well as Drs. McDonnell and Daley, believed Claimant would benefit from the procedure. Finally, Dr. Guerrero disagreed with Dr. Dozier's opinion that Claimant was capable of working an eight-hour day with restrictions of no lifting, a maximum of two hours of kneeling, squatting, bending, stooping, twisting, and climbing stairs and ladders. Dr. Guerrero adhered to his prior opinion that Claimant was not capable of working, not even a sedentary job. He stated that Claimant could not sit for more that fifteen to thirty minutes because of his lumbar pain, could not stand for more than thirty minutes because of his lumbar and knee pain. Dr. Guerrero stated that Claimant did need further medical care.

William Phillip Osborne, M.D.

Dr. Osborne testified by deposition on September 23, 2004. His deposition is located at Employer's Exhibit 46 and his records are found at Employer's Exhibit 24.[7] Claimant's Exhibit 10 contains both Dr. Osborne's records and deposition. Dr. Osborne testified that he initially saw Claimant on June 8, 1998 at the request of the Texas Worker's Compensation Commission, and determined that Claimant had reached MMI on March 27, 1998, as determined by Dr. Dozier, and Dr. Osborne opined that Claimant's situation had not changed from March until June. Dr. Osborne stated that after examining Claimant and watching the surveillance video taken of him, Dr. Osborne saw no reason Claimant could not perform light to sedentary work.

Dr. Osborne testified that Claimant's second knee surgery was the same sort of procedure that he had undergone previously on his knee. He stated that based on the MRI, Claimant could have had another small tear in the meniscus that

[7] Dr. Osborne agreed to provide a CV to be annexed to his deposition but neither party submitted it, though his correspondence indicates that he is a Fellow, American Academy of Disability Evaluating Physicians and he testified that he has extensive experience with impairment ratings.

needed correction. Dr. Osborne was of the opinion that the second surgery did not benefit Claimant.

Dr. Osborne testified that on examination, Claimant had positive results for all five Waddell's signs, which he explained in terms of physical examination findings that cannot come from physical injury. If three or more of the categories are positive, then the patient is likely to be at least exaggerating his responses. Dr. Osborne stated that after Claimant's second surgery, he was not extending his knee very well and was walking with a crutch, but when Dr. Osborne distracted him, he got the knee to straighten out. He described symptom magnification as meaning the patient presents more symptoms than there are physical evidence of, and Wadell's Signs are one of the "classic" means of determining magnification of symptoms.

Dr. Osborne noted that after examining Claimant for the second time on February 26, 2000, he did not change the MMI date of March 27, 1998. He explained that by that point, Claimant had undergone his second knee surgery and did not improve, but perhaps was a bit worse because he developed more arthritis in his knee. Dr. Osborne explained that he did not change the MMI date because Claimant had shown no improvement.

As part of his examination of Claimant, Dr. Osborne performed range of motion testing. He found that Claimant had one hundred percent range of motion in his cervical neck, his shoulders, elbow flexion and wrist were normal, and his hand grasp strength, fingers, and upper extremities were also normal. He noted that there was no muscle wasting, which he described as atrophy of the muscle which is one of the "strongest signs" of injury. (EX 46, p.13). Dr. Osborne noted that Claimant was negative for Tinel's sign which he explained as meaning that there were no evidence of carpal tunnel syndrome. Claimant's thoracic spine was normal, and he would not move his lumbar spine more than ten degrees in any direction. Dr. Osborne stated that if a patient cannot move more than ten degrees in any direction, he should have a "rather startling abnormality present" which Claimant did not. Dr. Osborne stated that he could not perform several tests on Claimant because of Claimant's complaints of pain.

Dr. Osborne had reviewed Dr. Dozier's records and agreed with Dr. Dozier's opinion that Claimant was capable of performing light duty work. Dr. Osborne testified that he had no problems with the sedentary positions identified by Mr. Quintanilla, even on a forty-hour per week basis.

Dr. Osborne testified that the surveillance video he watched helped him determine that he was correct about Claimant's symptom magnification and secondary gain. He said that in the video, Claimant had to have been doing an "oxygen consumption level of at least two METs," which are metabolic equivalents of oxygen consumption. (EX 46 p.26.). He stated that "at rest" is approximately one MET, and the man in the video walked at a fairly good pace, bending and locking his knees with no problems. Dr. Osborne stated that Claimant performed better on the examination than he showed Dr. Osborne.

Dan W. Parkinson, M.D.

Claimant was referred to Dr. Parkinson, an orthopedic surgeon, by Dr. Garcia, and first saw Dr. Parkinson on October 29, 1997. Dr. Parkinson's records comprise Employer's Exhibit 22 and Claimant's Exhibit 21. Claimant's chief complaint was listed as left knee pain. Dr. Parkinson conducted a physical examination and noted that the MRI revealed medial and lateral menisceal tears in Claimant's knee. Dr. Parkinson diagnosed Claimant with medial and lateral menisceal tears of the left knee and recommended arthroscopy of the left knee but noted that Claimant did not want to undergo surgery, so instead, Dr. Parkinson recommended an aggressive course of physical therapy. He stated that Claimant was "capable of light duty if such is available."

Dr. Parkinson's records indicate that Claimant underwent arthroscopic surgery on his left knee on December 15, 1997. On March 15, 1998, Claimant visited Dr. Parkinson for a follow-up examination. Dr. Parkinson noted that Claimant had excellent range of motion and no effusion, but had poor quadriceps control and complained of them intermittently giving out. Dr. Parkinson released Claimant to limited duty.

John K. Dozier, M.D.

Dr. Dozier conducted an independent medical examination of Claimant on March 27, 1998. His records are located at Employer's Exhibit 23.[8] Dr. Dozier noted that Claimant complained of back, buttock, posterior thigh and left knee pain. Claimant reported his back pain as being greater than his knee pain.

Dr. Dozier conducted a physical examination and range of motion tests. He opined that Claimant's limitation of motion with regard to his back was due to "voluntary restriction," as was Claimant's limitation of range of motion in his left knee. Dr. Dozier noted that Claimant's responses to Waddell Test were

[8] Only Dr. Dozier's records are available because he passed away before his deposition could be taken.

inappropriate. Dr. Dozier requested diagnostic studies of the lumbar spine which revealed no degenerative changes.

Dr. Dozier diagnosed Claimant with lumbar strain, resolved, pre-existing degenerative disc disease, status-post arthroscopic procedure left knee with total lateral meniscectomy and partial medial mensicectomy, and symptom magnification. He opined that Claimant had reached MMI effective the date of the exam, and no further treatment was necessary. Dr. Dozier stated that Claimant was able to return to at least sedentary work at that time with a restriction against heavy lifting for an indefinite period of time.

Dr. Dozier reexamined Claimant on June 23, 2000. He noted that Claimant had undergone a second operation on his left knee in 1999. Claimant was treating with Dr. Guerrero and participating in physical therapy twice weekly. Dr. Dozier's records indicate that Claimant reported his back and knee had both gotten worse since the last IME. Claimant was using a cane and said that his back hurt more than his knee. Claimant reported that Dr. Rodriguez had recommended back surgery but Claimant was afraid to undergo the procedure. Dr. Dozier noted that Claimant also reported a chronic cough since his second knee operation. Dr. Dozier examined Claimant and gave the same diagnosis as he did in the previous IME, but noted that Claimant showed onset and progression of arthritis in his left knee. He opined that physical therapy had been used to its maximum benefit with regard to Claimant's back and further physical therapy would not benefit Claimant, nor would surgical intervention. He opined that Claimant was capable of "light duty" with suggested restrictions of bending, crouching, stooping and walking with accommodations, sitting and standing with allowance for periodic postural adjustments and no kneeling. He reviewed the results of Claimant's FCE and stated that realistically, Claimant would only be capable of returning to a sedentary-type position.

Dr. Dozier's final exam of Claimant occurred on February 6, 2003. Dr. Dozier stated that since he last saw Claimant, Claimant's only treatment consisted of one injection, to which Claimant had some type of reaction so the other injections were not completed. Claimant continued to treat with Dr. Guerrero whom he saw once monthly in order to receive medication, though Claimant was "unclear" as to what his medications were. Claimant reported his symptoms as being about the same, and reported that his major pain was in the lumbar area. Dr. Dozier reviewed an MRI of the lumbar spine which indicated a three to four millimeter diffuse bulge at L4-L5 and a two to three millimeter bulge at L5-S1. He reviewed a report by Dr. McDonnell indicating that Dr. McDonnell wished to

perform an extensive spinal operation, with an accompanying second opinion by Dr. Daley who agreed to the procedure.

Dr. Dozier examined Claimant and performed range of motion tests. His diagnosis was degenerative disc disease, moderate, L4-5 and L5-S1, osteoarthritis, left knee (status post arthroscopic procedure), and gross symptom magnification. He opined that the symptoms of Claimant's work-related injury had "long since passed" and his symptoms were currently furthered by his gross degree of symptom magnification. Dr. Dozier opined that Claimant did not need any prescription medication, but could make do with over-the-counter medications because he had "a disease of ordinary life," namely degenerative disc disease and osteoarthritis. Dr. Dozier stated that he "totally" disagreed with Dr. McDonnell's assessment regarding the need for spinal surgery, as well as Dr. Daley's second opinion. He stated that a lumbar surgery would fail and Claimant would be rendered worse "by a quantum amount."

Mark S. Sanders, M.D.

Dr. Sanders is an orthopedic surgeon who initially saw Claimant on referral from Dr. Guerrero on September 30, 1999. CX 6, EX 27. Dr. Sanders noted that Claimant had undergone the first knee surgery but reported pain and swelling, stating that anti-inflammatories and physical therapy were not helpful. Dr. Sanders opined that Claimant had post-traumatic osteoarthritis of the knee which had not responded to conservative treatment and therefore another arthroscopic surgery was necessary. Dr. Sanders' notes indicate that Claimant's second knee surgery was performed on November 9, 1999. Dr. Sanders saw Claimant for follow-up on January 13, 2000 and noted that Claimant complained of pain and ambulated with a cane. Dr. Sanders recommended physical therapy and prescribed Darvocet N-100 for pain. Claimant was deemed unable to work from September 30, 1999 until May 2000.

On February 10, 2000, Dr. Sanders noted that Claimant was not attending physical therapy because his carrier would not approve it, so Dr. Sanders renewed Claimant's Darvocet prescription. He expected Claimant to reach MMI from the surgery in four months. On March 9, 2000, Claimant still had not begun physical therapy and Dr. Sanders noted minimal swelling in Claimant's knee. On May 4, 2000, Claimant walked with a cane and reported some improvement in his knee with physical therapy.

Mark F. McDonnell, M.D., P.A.

Dr. McDonnell specializes in spine surgery and evaluated Claimant on August 29, 2000. EX 28, CX 5. Dr. McDonnell's records reflect his opinion that Claimant was severely impaired, with a left-sided limp, and that examining Claimant was difficult because he was in "so much pain." Dr. McDonnell noted paraspinal muscle spasm in the cervical, thoracic and lumbar regions. Dr. McDonnell stated that Claimant was able to walk with a cane and had a persistent cough throughout the examination, which Claimant stated he had since being intubated for his first surgery. Lumbar spine x-rays showed some disc space collapse at L5-S1 with mild spondylosis, a CT of the lumbar spine performed in April 1999 showed small disc herniations at L4-5 and L5-S1, chest x-ray was normal, and a lumbar discogram of July 2000 showed no pain with normal appearance at L2-3 and L3-5, but L4-5 showed a large annual tear. Dr. Sanders' diagnosis was post-traumatic internal disc derangement at L4-5 and L5-S1, chronic pain syndrome, left knee internal derangement, and persistent cough temporarily related to intubation for knee surgery. Dr. Sanders recommended lumbar surgery, but first wanted an MRI of the lumbar region and wanted Claimant cleared by an ENT because Claimant's cough was "apparently related to his intubation" and would be very disruptive after lumbar surgery, so Dr. McDonnell referred Claimant to Dr. Kevin Smith, an ENT.

Dr. McDonnell saw Claimant again on February 6, 2001. Claimant had undergone the lumbar MRI, and Dr. McDonnell reviewed the report which indicated a disc herniation at L4-5 and dessication and some collapse at L5-S1. Dr. McDonnell noted that Claimant saw Dr. Smith for an ENT consult and Claimant reported that he had a ruptured left eardrum, trouble swallowing and a persistent cough. Dr. McDonnell stated that he asked Claimant to consider posterior decompression, instrumentation and fusion of L4-5 and L5-S1. He stated that he discussed the procedure with Claimant who understood the risks of the procedure, including paralysis.

On July 3, 2001, Dr. McDonnell's note indicates that he received a report from Dr. Michael Caplan dated November 7, 2000, regarding Claimant's cough which stated: History: chronic cough. No significant past medical history, clinical findings normal, hypopharynx and larynx on endoscopic exam, next treatment plan: none. Refer to pulmonologist, prognosis good. Dr. McDonnell stated he agreed with this information and recommended referral to a pulmonologist.

Claimant did not see Dr. McDonnell again until July 2, 2002, where Dr. McDonnell noted that Claimant continued to complain of severe low back pain.

Claimant still had a persistent cough, but Dr. McDonnell did not have a final evaluation from a pulmonologist. Dr. McDonnell noted that Claimant had had several discussions regarding lumbar surgery with Dr. Guerrero, his treating physician, and could not decide whether to proceed. Claimant stated that he was afraid of surgery and believed that his cough was related to intubation, though Dr. McDonnell said he had to defer to the experts on that. Dr. McDonnell reiterated that it was Claimant's decision whether to proceed with surgery and told Claimant to come back at any time.

Phillip G. Daley, M.D.

Dr. Daley is an orthopedist who saw Claimant on March 14, 2001 for purposes of rendering a second opinion regarding the lumbar surgery recommended by Dr. McDonnell. EX 33, CX 7. Dr. Daley noted that MRI and CT scan showed that Claimant had a four to five millimeter bulge at L4-5 and L5-S1. Claimant had a chronic cough during the examination. Dr. Daley opined that in light of Claimant's long term persistent back pain, sciatica and disabling symptoms and the findings of degenerative disc disease at L4-5 and L5-S1, Claimant should undergo a discectomy and fusion as recommended by Dr. McDonnell. Dr. Daley noted that Claimant was aware of the risks of the surgery and that he may not get relief and may be rendered worse, but stated that Claimant was "very insistent on being operated" because he could not continue the way he was.

Louis Hamer, M.D.

Dr. Hamer testified by deposition on November 4, 2004. Dr. Hamer's deposition and records are located at Employer's Exhibit 47. Dr. Hamer testified that he is board certified in internal medicine, pulmonary disease, and critical care medicine. He initially saw Claimant on October 27, 2004. Dr. Hamer stated that Claimant's chest x-ray of the lungs were normal. He said that Claimant coughed frequently during the examination, but noted that Claimant did not cough when he was not aware that Dr. Hamer could see him. Dr. Hamer's report noted that Claimant reported his coughing to be worse after eating and while chewing. The cough was reportedly worse at night. Dr. Hamer concluded that Claimant's cough may have resulted from multiple causes including gastro-esophageal reflux and rhinitis with postnasal drainage. He opined that proton pump inhibitors along with treatment for rhinitis would probably alleviate Claimant's coughing. (EX 47, p.53).

Dr. Hamer viewed the surveillance videos of Claimant and stated that Claimant did not cough in the videos, though he "coughed the entire time" he was

in Dr. Hamer's exam room. Dr. Hamer testified that Claimant wore a back brace and used a cane when he came to Dr. Hamer's office, but in the video, he did not use either item when he returned to his car after a doctor's appointment. Dr. Hamer opined that "secondary gain factors" appeared to be present in Claimant's case. He described this situation as exaggeration of symptoms for some ulterior motive.

Dr. Hamer issued a report after examining Claimant and opined that there is no connection between Claimant's reported knee and back problems and resultant surgery to Claimant's complaints of coughing. EX 47, p.11. He stated that during the exam, Claimant complained of acid reflux and rhinitis which are common causes of cough. Dr. Hamer said that there is no way that either rhinitis or reflux disease could be related to a knee or back injury. Dr. Hamer stated that Claimant's cough might prohibit certain types of employment, such as working on electrical equipment at high heights. He opined that there was nothing related to Claimant's respiratory condition which would prevent him from performing any of the positions identified in Mr. Quintanilla's labor market survey.

On cross-examination, Dr. Hamer acknowledged that he only saw Claimant on one occasion, October 27, 2004. He stated that in formulating his evaluation of Claimant he used x-rays and physical examination, and also measured Claimant's oxygen saturation. Dr. Hamer said that Claimant did not bring any medical records with him to the visit, but he had reviewed Claimant's records prior to examining him. Dr. Hamer stated that Claimant's records revealed little of relevancy to him because they mostly related to his knee and back conditions. He acknowledged that he was not Claimant's treating physician and thus did not have the opportunity to observe how Claimant's symptoms developed, whereas Claimant's treating physicians were able to see Claimant numerous times.

Dr. Hamer opined that Claimant did not appear to be truthful with regard to answers to questions posed by Dr. Hamer about Claimant's symptoms. Dr. Hamer believed this because Claimant told Dr. Hamer that he could not feel his legs and had numbness in his arms; he had "a myriad of complaints that didn't fit well together," and he coughed constantly which is not typical of a patient complaining of cough. EX 47, p.26. Dr. Hamer testified that he could state with reasonable medical certainty that nothing could have occurred regarding Claimant's 1998 surgery that could have contributed to his pulmonary problems. EX 47, p.29. He stated there is no causal connection between Claimant's coughing and his work-related injury. On redirect, Dr. Hamer reiterated that there were no objective

manifestations or problems with Claimant's lungs or respiratory system. He stated that Claimant's cough was not related to a surgical procedure.

Ihsan Shanti, M.D., Ph.D.

Dr. Shanti is the medical director of David Suchowiecky, M.D. and Associates Pain Management and Mental Health Center. Claimant was referred to Dr. Shanti by Dr. Guerrero for evaluation of chronic neck, thoracic, low back and left knee symptoms and symptoms of depression associated with the related injury. EX 34. Dr. Shanti evaluated Claimant on April 16, 1999, where Claimant complained of constant back and neck pain, and stated that he was depressed with a noticeable lack of energy and motivation. Dr. Shanti diagnosed Claimant with major depression secondary to chronic pain and recommended a pain management program consisting of medical management, biofeedback therapy, and individual and group therapy. Dr. Shanti's correspondence to Dr. Guerrero dated June 1, 1999 indicates that Claimant had completed three sessions of the pain management program. On August 18, 1999, Dr.Shanti performed an intra-articular injection of bupivacaine into Claimant's left knee. The note indicates that Claimant tolerated the procedure well and there were no apparent complications.

Functional Capacity Evaluations

Claimant's first FCE was conducted on June 26, 2000 at MedTest. EX 35. The FCE results indicated that Claimant was capable of work in the light category, as defined by the U.S. Department of Labor with restrictions of bending, climbing, crouching, kneeling, sitting for ten to twenty minutes with periodic adjustment for postural change as needed, standing for five to ten minutes with periodic adjustment for postural change as needed, and walking ten to twenty minutes.

Claimant underwent a second FCE performed by Yesenia J. Sepulveda, D.C. on August 27, 2002. EX 37. The results from the FCE indicated that Claimant was unable to perform the following activities on a constant basis: walk over twenty minutes, lift at the light physical demand level, balance, stand longer than thirty minutes due to lumbar and left knee pain, sit longer than fifteen minutes due to lumbar and left knee pain, and perform repetitive foot movements.

Claimant's most recent FCE occurred on January 31, 2003. EX 36. The FCE revealed that Claimant was capable of performing work at the sedentary level with lifting of up to ten pounds maximum on an occasional basis. Comments provided by the evaluator included that Claimant suffered from uncontrolled coughing throughout the FCE, and he could not complete the static strength leg lift,

torso lift, or "floor to knuckle" tests, and did not attempt the floor to shoulder, the dynamic activities, crouching or kneeling tests.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Jurisdiction

In order to be covered by the Act a claimant must satisfy both the "situs" requirement of Section 903(a) and the "status" requirement of Section 902(3) of the Act. *See* 33 U.S.C. §§ 902(3), 903(a); *Northwest Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Situs refers to the place of job performance, whereas status refers to the kind of work performed. With regard to land-based workers, the workers need never go aboard a vessel or other navigable waters to be covered under the Act. *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979) *cert. denied*, 446 U.S. 981 (1980). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Melerine v. Harbor Construction Co.*, 26 BRBS 197 (1992). The United States Supreme Court has held that in order to be covered under the Act as a longshoreman, an employee must be engaged in work which is integral to the overall process of loading and unloading vessels at a situs which is on or adjoining navigable water, including those specifically named in the Act. *Caputo*, 432 U.S. at 249. Thereafter, the Court held that coverage extends to workers who, although not actually loading and unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation, as well as including those

areas removed from navigable water but with the purpose of a maritime situs. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979).

With regards to situs, Section 903(a) provides that a compensable injury must occur on the navigable waters of the United States including any "adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). By amending the Act in 1972, Congress expanded the jurisdictional lines landward to cover injuries occurring on the enumerated adjoining land areas. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 510 (5th Cir. 1980).

In *Texports Stevedore Co. v. Winchester*, the Fifth Circuit Court of Appeal enunciated a case-by-case analysis approach to issues of situs by considering all the circumstances, including the customary usage of the site in question, *i.e.*, whether significant maritime activity occurred at the site, whether the site is within the contiguous shipbuilding area that adjoins the water, whether the adjoining buildings are maritime or non-maritime, and whether the site has some nexus with the waterfront. The court noted that so long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the Act's requirement that it adjoin navigable waters.

In a claim very similar to the one here, the Board recently applied the *Winchester* factors in *Uresti v. Port Container Industries, Inc.* 33 BRBS 215 (2000), when it held that the Port of Houston satisfied the Fifth Circuit's geographic requirement that it be in the vicinity of navigable waters. *Id.* at 217. In that case, the claimant was injured while unloading angle irons from a rail car inside the Port of Houston. The Board determined that the Port Rail warehouse had a sufficient functional nexus to maritime activity so as to "warrant a finding of coverage," and noted that "the unloading process is not complete until the cargo enters the stream of land transportation, which in this case occurs once the cargo departs the Port of Houston." *Id.* at 218. The Board concluded that since a portion of the steel received at the rail warehouse had been offloaded from a vessel and moved through the warehouse en route to overland transport to the employer's customers, the site was used as a step in the unloading process. In the instant case, Claimant testified that he was working on the docks at the time of his injury. Even assuming *arguendo* that Claimant was working in Employer's yard, the location was within the Port of Houston and engaged as a part of the unloading process. Therefore, I find that Claimant was injured on a covered situs.

With regard to status, Section 902(3) limits coverage to "employees," defined as those engaged in "maritime employment." Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* U.S.C. 9§ 902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (1989).

The Supreme Court, in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), which Employer cites, held that a truck driver responsible for picking up or delivering cargo was not a covered employee under the Act. However, the Board later distinguished *Caputo* from a driver with the same duties as Claimant, explaining that unlike the drivers in *Caputo*, the claimant did not deliver cargo to the employer's customers or "anywhere beyond the boundaries of the Port area."[9] *Uresti*, 33 BRBS 215, 219 (2000). The Board determined that the claimant's situation was more similar to *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 66, 82 (1979), where the claimants were deemed to be covered employees where they were injured on a dock while fastening military vehicles to railroad flatcars and while "unloading bales of cotton for transport between warehouses in the port area." *Uresti*, 33 BRBS at 219. The Board noted the Supreme Court's finding in *Ford* that the claimants were engaged in maritime employment because they were performing "the type of duties longshoremen perform in transferring goods between ship and land transportation." *Id.* Accordingly, the Board found that the "loading and unloading process is complete once cargo enters the stream of interstate commerce or is delivered to the consignee," and because the claimant in *Uresti* neither delivered cargo to the consignee nor drove outside the Port of Houston, the Board held that he was engaged in an "intermediate step" analogous to the work performed by the claimants in *Ford. Id.*

The Board cited further examples of claimants who were truck drivers and who were deemed to be covered employees, and held that the *Uresti* claimant's duties never took him to the place of consignee's business, but "remained in the port area, transporting steel products between the ship and storage facilities. Thus,

[9] In *Uresti*, the claimant's job was described as "after reporting to his supervisor for his assignment, he would drive his truck to the dock next to the appropriate vessel and the longshoremen would load the truck with steel plates, steel coils, etc. Claimant would then transport the materials from the dock to a warehouse or a yard in the port area for storage." Claimant's duties included "waiting for the loading to occur, "flagging" or guiding the crane operator so that the load was placed properly on the trailer, and *securing the load to the trailer prior to driving it to its place of storage within the port facility*." 33 BRBS at 215 (emphasis added).

the Board found that the claimant performed "intermediate steps in the unloading process," and his work was deemed maritime in nature. *Uresti*, 33 BRBS at 220.

Here, Claimant testified that he was injured when he fell from a forklift in an attempt to secure pipes to the truck he was assigned to drive. Claimant and his supervisor, Mr. Ramirez both testified that Claimant worked as a yard truck driver. Claimant never drove outside the Port of Houston. Even Mr. Smith, Employer's safety manager, in testifying that Claimant usually worked in the yard, stated that part of Claimant's job was assisting in the loading and unloading of vehicles. Given the striking similarity of the facts in *Uresti* and those in the present case, I am bound to follow the Board's holding, and I find that Claimant was performing maritime work at the time of his injury and accordingly find that Claimant meets the "status" requirement of Section 902(3) of the Act, as well as the situs, and that Claimant is covered by the Act.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant testified that on September 23, 1997, he fell from a forklift, injuring his back, knee and hands. He reported the accident to Employer and sought medical attention the same day. Dr. Garcia's note dated September 23, 1997 indicates that Claimant suffered a superficial laceration on his left hand, tenderness in his neck, left ribs and lumbar spine, and an abrasion, tenderness, effusion and painful, limited flexion of his left knee. EX 32, pp. 1-2. Mr. Ramirez, Claimant's supervisor, testified that he found Claimant injured on the morning of September 23, 1997. Tr. 86. Claimant has presented photographs of Employer's facilities which he testified accurately depict the trucks he used to drive, and portray the trucks filled with pipes. CX 13, Tr. 117. As to his back, knee and hands, I find that Claimant has established a *prima facie* case of compensability with regard to these injuries he suffered on September 23, 1997, in that he has established he suffered a harm and that working conditions existed which could have caused the harm. Employer offers no argument or evidence to rebut the Section 20(a) presumption.[10]

As to Claimant's complaint regarding his throat and resultant chronic cough, however, I find that Claimant cannot invoke the Section 20(a) presumption. Though Claimant is correct in his assertion that if the cough was related to his compensable injuries it too would be compensable, I find that this complaint is not causally related to Claimant's work-related injury. Claimant testified that he began having throat problems, specifically a cough, following his first knee surgery. He states that he complained of this problem to Drs. Guerrero and Dozier. Claimant argues that Dr. McDonnell opined that the cough was related to treatment for Claimant's knee injury. However, Dr. McDonnell stated that Claimant presented with a persistent cough and noted "He (Claimant) says his chronic cough originated after he was intubated from the first surgery." EX 28, p.1. Dr. McDonnell later stated that he recommended Claimant see an ENT because "this cough is apparently related to his intubation." EX 28, p.2. Only in a later letter did Dr. McDonnell state that the cough was "obviously related to the treatment of his knee injury," though in the same paragraph he stated that Claimant said "his chronic cough originated after he was intubated from the first surgery." EX 28, p.3. On July 2, 2002, Dr. McDonnell's note states that Claimant was trying to decide whether to undergo back surgery and that he had problems after his last two surgeries "and has this chronic cough. He thinks it is from the intubation. I had to defer to the experts on that." EX 28, p.11. Clearly, Dr. McDonnell had no other

[10] At the formal hearing, Employer's counsel agreed that he had no substantial evidence to rebut the Section 20(a) presumption with regard to Claimant's knee and back injuries. Tr. 193.

source of information than what Claimant reported to him when he made his assessment and he even then equivocated by saying he deferred to the experts.

Claimant also complained of persistent cough to Dr. Dozier during the IME on June 23, 2000. Dr. Dozier's notes state that Claimant related "a chronic cough since his last knee operation." EX 45, p. 185. Dr. Dozier stated that Claimant's then-existing problems were osteoarthritis of the left knee, a perceived lower back condition, and now a chronic cough secondary to the anesthesia during the second knee operation. EX 45, p.188. However, Dr. Dozier's too report reveals that this information was based solely on Claimant's report and not any diagnostic tests. Dr. Dozier's final report, dated February 6, 2003, contains no mention of Claimant's coughing problem. EX 23, p. 14.

After Claimant saw an ENT, Dr. McDonnell summarized that physician's report as "normal" and concurred with referring Claimant to a pulmonologist. There is no indication that the ENT physician determined that a connection existed between Claimant's cough and his first knee surgery. Claimant next saw Dr. Hamer, a pulmonologist, on October 27, 2004. He noted that Claimant's chest x-rays were clear and attributed Claimant's coughing problems to gastro-esophageal reflux and rhinitis with postnasal drainage. EX 47, p.53. Dr. Hamer was of the opinion that there was no connection between Claimant's cough and knee surgery. EX 47, p.11.

Given the above evidence, I find that Claimant cannot invoke the Section 20(a) presumption with regard to his complaints of chronic cough, but even assuming *arguendo* that Drs. McDonnell and Dozier's opinions are sufficient for invocation clearly the presumption is rebutted and when the evidence is weighed it does not support a finding that Claimant's cough is compensable.

Of the physicians who first mentioned the cough, their sole source of information was what Claimant reported to them. When Claimant was seen by an ENT physician, the findings were normal. When Claimant was seen by a pulmonologist, it was opined that his cough was related to other medical conditions he had, namely reflux and rhinitis, and not his knee surgery. Because there is no medical report linking Claimant's cough to his knee surgery which is based on anything other than Claimant's report, and because the opinion attributing Claimant's cough to other ailments was based on chest x-rays, measuring Claimant's oxygen saturation levels, and physical examination, I find that Claimant's cough is not related to his work-related injuries.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

Knee Injury

In the present case, the parties dispute whether Claimant has reached MMI. Claimant argues that on September 1, 2004, his treating physician, Dr. Guerrero, testified that in his opinion Claimant had not yet reached MMI because Claimant still needs lumbar surgery. Employer, on the other hand, contends that Claimant has long since reached MMI as evidenced by Drs. Dozier, Parkinson, Osborne, and, even Dr. Guerrero, placing Claimant at MMI. Employer argues that Claimant reached MMI on March 27, 1998, as initially determined by Dr. Dozier and agreed to by Dr. Osborne. Employer states that Dr. Guerrero placed Claimant at MMI on June 8, 1998, though he subsequently rescinded his opinion.

In his deposition, Dr. Guerrero acknowledged that he had originally determined that Claimant had reached MMI on June 8, 1998, but explained that his opinion changed after that date. He stated: "that [June 8, 1998] was referring to the knee, I believe. It changed after we looked at the back." EX 45, p.36. He opined that since Claimant had a second knee surgery on November 9, 1999, it would also imply that he had not reached MMI on June 8, 1998. *Id.* Dr. Guerrero testified that in his opinion, even if Claimant elects not to have back surgery, he has not

reached MMI because "there's things that can be done" short of lumbar surgery, which he explained as monitoring of Claimant's condition and medication for his pain. *Id.* at 37.

Dr. Guerrero's above statements are puzzling in light of other portions of his deposition testimony, specifically the following exchange:

Q: Well, at 6-8-98 he's MMI, and you are indicating he's MMI at that date, correct, 6-8-98?
A: Right.
Q: And so if he's MMI at that date, you're not disagreeing that he could do some duty at that time, right?
A: Right, some kind of duty, sedentary type. EX 45, p.16.

Only later did Dr. Guerrero explain that he changed his mind regarding Claimant's MMI date. What is clear, however, is that specialists Drs. Dozier and Osborne placed Claimant at MMI on March 27, 1998. It is also clear that Claimant underwent another knee operation on November 9, 1999, one that, in Dr. Osborne's opinion, was identical to the procedure performed in December 1997. EX 46, p.56. Apparently all physicians who saw Claimant agreed that the second knee surgery did not benefit Claimant, rather, his condition appeared to worsen following the surgery.

Both Drs. Dozier and Osborne declined to change their assigned MMI dates after learning of Claimant's subsequent second knee surgery and after examining him, determined that the second knee surgery had done nothing to benefit Claimant. Dr. Osborne examined Claimant on February 25, 2000 and found that Claimant had the same complaints as he had before the second surgery and exhibited the same findings on physical exam. He noted that Claimant's condition actually worsened after the second surgery, and accordingly, suggested an increase in impairment rating from 13 percent to 15 percent.[11] Dr. Osborne stated "back in 1998 this patient was not likely to get better regardless of [what was performed] in the future…I think, after examining him today, this is the case. In other words, he has not improved at all, even with further surgery and he is not likely to improve. If anything, he is likely to get worse with time." EX 24, p.13.

[11] At Claimant's June 15, 1998 visit, Dr. Osborne assigned a whole body impairment of 13%, 8% of which was attributable to Claimant's knee and 5% to his back. Dr. Osborne increased the rating of Claimant's knee to 11% following the second surgery. EX 24, p. 13.

Regardless of Claimant's second surgery, I find that Claimant reached MMI as to his knee on March 27, 1998, the date established by Dr. Dozier and agreed to by Dr. Osborne. The mere possibility of future surgery does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuliding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). Granted, at the time Drs. Guerrero, Dozier and Osborne placed Claimant at MMI, none of them were aware that Claimant would have additional surgery, but the surgery did not improve Claimant's condition.

In so finding, I do not accept June 8, 1998, the date urged by Dr. Guerrero at the time as the date of MMI regarding Claimant's knee. Dr. Guerrero stated in a letter to Texas Worker's Compensation that the MMI date should be changed from March to June because Claimant had "undergone some additional procedures in which he has improved somewhat," EX 30, p.1, but this statement is not supported by the evidence. Also, Dr. Guerrero, in all of his notes and correspondence, states that he had been caring for Claimant since February 26, 1999, so he could not have provided treatment to Claimant between March and June of 1998.

Back Injury

Claimant's back injury is a less clear-cut issue. As opposed to Dr. Guerrero, who, in his deposition testimony associated his June 8, 1998 MMI date with Claimant's knee, after starting to treat his back problem, Drs. Dozier and Osborne included Claimant's back problems in their assessments and nonetheless determined he had reached MMI on March 7, 1998. Dr. Guerrero opined that Claimant could have the lumbar surgery recommended by Dr. McDonnell, and therefore, had not reached MMI. Dr. Garcia, before discontinuing care of Claimant, opined that Claimant required further treatment of his back. Drs. McDonnell and Daley recommended that Claimant undergo lumbar surgery.

The medical evidence supports neither the contention that Claimant reached MMI with regard to his back on March 27, 1998, nor that he has not yet reached MMI. Rather, the evidence, when read as a whole, indicates that Claimant's back has not improved and he has not elected to have surgery. Claimant has received the same treatment for years from Dr. Guerrero, consisting of medication. He attempted physical therapy which he reported as not helping his back pain. Dr. Daley, in rendering a second recommendation of the surgery, noted that Claimant was aware of the risks of surgery "and that he may not get relief with the surgery and could be made worse." EX 33, p.1. Dr. Osborne opined that the surgery would

not benefit Claimant but would render him worse. There is no opinion contained in the evidence which establishes what degree of success the surgery would have produced; and clearly, as evidenced by his own testimony and supported by the medical records, Claimant has elected not to proceed with surgery. Tr. 128; EX 30, p.50. As such, I find that Claimant reached MMI with regard to his back when he declined to undergo surgery on September 23, 2002.

My finding is supported by evidence in the record. Dr. Guerrero, who asserts that Claimant has not to date reached MMI, stated that Claimant's condition "has not improved since August 2000, and in some respects, has deteriorated." CX 2, p.17. Claimant's back condition has not responded to physical therapy, injections, acupuncture, or medication, and Claimant has demonstrated the same complaints almost continuously since his accident in 1997. *See* EX 28, 30; CX 7. Drs. Guerrero, McDonnell, and Daley believed that Claimant should undergo the lumbar surgery, and the surgery was scheduled to be performed on April 23, 2002. If surgery is anticipated, maximum medical improvement has not been reached. *See McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12 (2000) (citing *Kuhn v. Associated Press*, 16 BRBS 46 (1983)), but when Claimant finally declined to undergo surgery and his condition had not improved, but remained constant, MMI was reached. Dr. Guerrero's notes indicate that Claimant declined surgery on September 23, 2002. EX 30, p.49. Since that time, there is nothing in the evidence to indicate that Claimant's condition has improved, rather, the evidence indicates that Claimant has sporadically seen Dr. Guerrero and has received the same treatment. Dr. Guerrero's notes from the period beginning August 20, 2002, indicate that Claimant complained of back pain at every visit, and Dr. Guerrero's treatment plan consisted of "off work, continue medications" or "same medications."[12]

An employee is permanently disabled when his "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2s 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Based on the medical evidence of record, I find that Claimant meets the above definition and as a result reached MMI on September 23, 2002, the date he declined lumbar surgery.

[12] This is illustrative of Dr. Guerrero's notes dated August 20, 2002; September 23, 2002; October 23, 2002 (EX 45, p.99); November 18, 2002; January 6, 2003; February 24, 2003 (EX 45, p.65); March 24, 2003; May 12, 2003; June 20, 2003 (EX 45 p. 64); November 28, 2003, and June 22, 2004 (EX 45, p.63).

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, there is no contention that Claimant is capable of returning to his previous occupation which entailed heavy manual labor. None of the physicians who have treated Claimant in any capacity have indicated that he can return to his previous employment. Therefore, Claimant has established a *prima facie* case of disability and the burden shifts to Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the

precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this instance, Claimant asserts that his restrictions "of only possible sedentary or…for argument's sake, light work" leave him unemployable. Claimant argues that Employer did not show that real jobs were actually available to him, and he diligently tried to obtain the few jobs that were identified and did not secure employment. Claimant urges that Mr. Stanfill determined that the jobs identified by Mr. Quintanilla were inappropriate for Claimant considering his physical restrictions and inability to speak English.

Employer contends that the jobs identified by Mr. Quintanilla on February 21, 2001 and November 1, 2004 satisfy Employer's burden. Employer argues that Mr. Stanfill agreed that the positions identified by Mr. Quintanilla appear to be sedentary and to fit within Claimant's physical limitations. Employer also argues that Claimant did not demonstrate a diligent effort to secure employment as evidenced by the fact that he did not contact potential employers until three years after they were identified by Mr. Quintanilla.

To briefly recapitulate Claimant's restrictions and his physicians' opinions on his ability to work: Dr. Garcia never released Claimant to work during the time he treated Claimant, from September 23, 1997 through February 8, 1999. CX 11. On April 2, 1998, Dr. Dozier opined that Claimant was capable of at least sedentary work with an indefinite restriction against heavy lifting. EX 23, p.6. On June 23, 2000, Dr. Dozier determined that Claimant was capable of sedentary work and adopted the restrictions from Claimant's June 2000 FCE, including bending, crouching, stooping and walking with accommodations, sitting and standing with allowance for periodic postural adjustments and no kneeling. EX 23, p. 12. Dr. Osborne testified at deposition that there was no reason Claimant could not perform light to sedentary work, and stated that he had "no problem" with

Claimant performing the sedentary positions identified by Mr. Quintanilla's February 2001 report, even on a forty-hour per week basis. EX 46, p.27.

Dr. Parkinson, who performed Claimant's first knee surgery, stated on October 29, 1997 that Claimant was capable of performing "light duty" if such was available. On March 15, 1998, Dr. Parkinson released Claimant to "limited duty." EX 22. Dr. Sanders, who performed Claimant's second knee surgery, estimated on January 26, 2000 that Claimant would be able to return to work without restrictions in May 2000, but his notes indicate that he last saw Claimant in March and had not yet released him to work, yet planned to do so in three months' time. EX 27. Dr. Hamer testified that there was nothing related to Claimant's alleged respiratory condition which would prevent him from performing any of the positions identified by Mr. Quintanilla's labor market survey. Neither Drs. McDonnell nor Daley commented on Claimant's ability to work. EX 28, EX 33.

The FCE conducted on June 26, 2000 revealed that Claimant was capable of work in the "light" category with restrictions of bending, climbing, crouching, kneeling and sitting for ten to twenty minutes with periodic adjustment for postural change, standing for five to ten minutes with periodic adjustment for postural change as needed, and walking ten to twenty minutes. EX 35. The results of the August 27, 2002 FCE indicated that Claimant was unable to perform the following on a constant basis: walk over twenty minutes, lift at the light physical demand level, balance, stand longer than thirty minutes, sit longer than fifteen minutes, and perform repetitive foot movements. EX 38. The FCE conducted on January 31, 2003 indicated that Claimant was capable of performing work at the sedentary level with lifting up to ten pounds on an occasional basis. EX 37.

Dr. Guerrero maintained throughout the years he treated Claimant that Claimant was incapable of engaging in any work activity. However, in his deposition, he agreed that Claimant was capable of work at the sedentary level. First, he agreed that on June 8, 1998, the date he urged be used instead of Dr. Dozier's date of MMI, Claimant was capable of performing "some kind of duty, sedentary type." EX 45, p.16. After viewing part of the surveillance video, Dr. Guerrero stated that "there might be something" Claimant could do, such as "sit there and answer phones." EX 45, p.25. Dr Guerrero stated that he was unsure whether Claimant was capable of performing the courier and guard positions identified by Mr. Quintanilla. When asked about Claimant's ability to bend and grip, Dr. Guerrero stated that he did not think that Claimant could perform such

tasks on a repetitive basis, but stated that "if [Claimant] says he can do it, he can do it. It's up to him." EX 45, p.26.

Dr. Guerrero also opined that Claimant could not squat on a repetitive basis, but had no problem raising his arms. Dr. Guerrero did not want Claimant on "any machinery that has to be controlled with foot pedals" because of his back instability. He stated Claimant could not drive for long periods of time. Dr. Guerrero stated that Claimant is able to sit and stand at will. He stated that Claimant could lift ten pounds, but could not climb ladders, stairs, or kneel. EX 45, p.28. Dr. Guerrero agreed that "it was up to" Claimant as to whether Claimant could perform a job, and stated "if he says he can do it, there's no reason for me to disagree." EX 45, pp.32-33.

Mr. Stanfill, the vocational rehabilitation counselor, opined that Claimant was not employable due to multiple factors including his age, inability to speak English, limited educational background, physical limitations, and lack of transferable skills. Tr. 43. He acknowledged he had not read Dr. Guerrero's deposition testimony, and when he did, he interpreted Dr. Guerrero's statements as indicating that Claimant was capable of sedentary work. Tr. 53. As such, he agreed that the sedentary jobs identified by Mr. Quintanilla would fit with Claimant's restrictions. Tr. 59.

I do not credit Dr. Guerrero's opinion, despite the fact he is Claimant's treating physician. He is the only physician who has consistently stated that Claimant is unable to work. However, he equivocated once he saw the videos which depict Claimant standing for what appears to be hours, carrying bags, pumping gas, and the like.[13] After seeing this, Dr. Guerrero agreed that Claimant was capable of work. By stating Claimant was able to "sit and answer phones," Dr. Guerrero intimated that he was capable of performing sedentary work, something that Drs. Osborne, Dozier and Parkinson had stated long ago. Dr. Guerrero then proceeded to discuss Claimant's physical abilities, and stated that it was "up to" Claimant whether he could work. Therefore, though a claimant's treating physician can be given deference, in this instance I accept the well-reasoned opinions of Dr. Dozier, Diplomate, American Board of Orthopedic Surgery, Dr. Parkinson, a board certified orthopedic surgeon, and Dr. Sanders, an orthopedic surgeon, Dr. Hamer, board certified in pulmonology, critical care, and

[13] As previously discussed, Dr. Guerrero also equivocated regarding Claimant's MMI date.

internal medicine. At some time, all of these physicians determined that Claimant was capable of working.

Mr. Quintanilla identified four sedentary jobs on February 21, 2001. EX 41. He testified that these jobs, all assembler positions, were appropriate for Claimant's mental and physical capabilities. Mr. Quintanilla testified that he had observed individuals performing these jobs, and they would allow Claimant to perform his tasks either while seated or standing. The positions involved assembling computer parts, which Mr. Quintanilla described as a repetitive process of putting computers together and installing motherboards. Mr. Quintanilla stated that employees are instructed how to do and then perform the same task "over and over again." EX 48, p.45. He stated that employees work at the equivalent of a desk and can either sit or stand up. If Claimant needed to walk around, Mr. Quintanilla stated he would be able to do so on his breaks. These positions required no previous experience or knowledge of computers. The positions paid $7.00 to $7.50 per hour.

I find that these sedentary positions constitute suitable alternative employment. Despite Claimant's contention that these positions were available with staffing agencies, Mr. Quintanilla explained that such agencies are frequently used by employers, and that if an employee performs satisfactory work they are often hired. These positions require little proficiency in English and involve performing repetitive tasks. All of Claimant's physicians, including Dr. Guerrero, have conceded that Claimant is capable of sedentary duty. Dr. Osborne stated that Claimant was capable of performing these positions forty hours per week. At the hearing, Mr. Stanfill agreed that Dr. Guerrero's statements indicated functioning at the sedentary level. Mr. Stanfill testified that he did not contact the employers identified in Mr. Quintantilla's 2001 report because in his opinion, they are not a reliable source of information in that they may have a job one day and not the next. He stated that if Mr. Quintanilla testified that the jobs were sedentary and available in 2001, he could not dispute such statements.

Claimant argues that he contacted the employers identified in Mr. Quintanilla's February 2001 report on April 6, 2004. EX 49, p.93. A letter to Mr. Stanfill states that Claimant was "in the office" and the employers were contacted. The letter indicates that Julie Evans at TPI Staffing said to send a resume. Kerry Ragabi at Pro Staff indicated that there were not jobs available for non-English speaking persons. Mr. Haneline at Ameritech stated it would be odd for him to hire someone who cannot lift over ten pounds and does not speak English.

Claimant's phone calls do not demonstrate that he conducted a diligent search for employment. First of all, Claimant contacted the employers over three years after Mr. Quintanilla indicated that there were job openings appropriate for Claimant. Mr. Stanfill agreed that the jobs available in February 2001 may "certainly" not be available in April 2004. Second, there is no evidence that Claimant actually applied for any of these jobs or attempted to find any of his own volition. I do not find that Claimant diligently searched for employment.

Accordingly, I find that Claimant was temporarily totally disabled from September 23, 1997, the date of his accident, to February 21, 2001, when suitable alternative employment was identified. Thereafter, Claimant remained temporarily partially disabled until September 23, 2002, when he declined surgery to his back, and his disability was rendered permanent partial in nature.

When suitable alternative employment is shown, the wages which the new positions would have paid at the time of the claimant's injury are compared to the claimant's pre-injury wage in order to determine if he has sustained a loss in wage-earning capacity. *Richardson v. Gen. Dynamics Corp.*, 23 BRBS 327, 333 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (2d Cir. 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. Nat'l Steel & Shipbuilding*, 10 BRBS 649, 660 (1979). Hourly wages of jobs found to be suitable alternative employment may be averaged in order to calculate wage-earning capacity. *Avondale Indus. V. Pulliam*, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In this instance, of the wages paid by the jobs identified by Mr. Quintanilla in February 2001, two paid $7.00 per hour and one paid $7.50 per hour. Because only one of the jobs paid the higher wage, I find that Claimant's wage earning capacity as of February 21, 2001 was $7.00 per hour. Based on a forty hour work week, this figure yields a weekly wage of $280.00. Claimant's compensation will be adjusted accordingly.

Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, Claimant's wages are adjusted to reflect their actual value at the time of Claimant's September 1997 injury. The National Average Weekly Wage (NAWW) for September 1997 was $400.53, and the NAWW for

February 2001 was $466.91. Thus, the 1997 NAWW was approximately 86% of the 2001 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustment, I find that since February 21, 2001, Claimant has a residual wage earning capacity of $240.80 per week.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. *See* 33 U.S.C. § 907(c); 20 C.F.R. § 702.406. The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron*

Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

In the present case, Employer argues that Claimant never requested and Carrier never consented to a change of physician. Employer states that Claimant designated Dr. Guerrero as his treating physician under the Texas Workers Compensation statutes, but if his claim falls under the Act, then Claimant is bound to follow the Act's regulations for changing physicians. Employer asserts there is no authority which allows Claimant to utilize the state workers compensation procedures for changing physicians under the Act, therefore, Claimant should have requested written authorization from Employer or the District Director.

Claimant contends that his case has been treated as a state workers compensation case since the date of his accident. He has received compensation and medical treatment under the state regulations, and as a result, it would have been useless to request authorization from the District Director for authorization of medical treatment. Claimant contends that Employer/Carrier are responsible for Claimant's future medical care, any outstanding amounts incurred by Dr. Guerrero's care of Claimant, and mileage. I agree with Claimant.

Claimant was injured in 1997 and his request to change physicians was approved by the Texas Workers Compensation Commission on February 25, 1999. CX 19. Claimant has been under Dr. Guerrero's care for six years, and Carrier has made payments to Dr. Guerrero during this time. Claimant did not file a claim under the Act until March 1, 2000. Because Employer treated Claimant's injury as falling under the state workers compensation scheme, and Claimant followed the state procedure, it is understandable that Claimant would rely on the fact that his change was approved. Also, Carrier made payments to Dr. Guerrero as an indication that Dr. Guerrero was his choice of physician. Claimant was treating with Dr. Guerrero when he filed his longshore claim and had not been under the care of Dr. Garcia for some time. In essence, there was no "change of physician" for purposes of Claimant's longshore claim.

Accordingly, I find that Claimant did not receive unauthorized care from Dr. Guerrero. Therefore, Claimant is entitled to reasonable and necessary medical expenses incurred by treating with Dr. Guerrero, including Dr. Guerrero's outstanding bills. Claimant submitted a mileage log documenting his visits to Dr.

Guerrero, physical therapy, Dr. Parkinson, pain management, and Dr. Dozier totaling $916. 03. I find that mileage and Dr. Guerrero's treatment are related to Claimant's September 23, 1997 injury and are reasonable and necessary expenses which are the responsibility of Employer/Carrier.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 320 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment, not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. Gen. Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10(a) should apply. *Duncan v. Wash. Metro. Areas Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was "substantially the whole year" where the work was characterized as "full time," "steady" and "regular.") The number of weeks should be considered in tandem with the nature of the work when deciding whether the claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-56 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment but did not work the whole of the year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (5th Cir. 1991). This would be the case where the claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991)

Section 10(c) is a catch-all to be used in instances where the methods in 10(a) and 10(b) cannot realistically be applied. 10(c) is used where the claimant's employment is seasonal, part-time, intermittent or discontinuous, or where 109a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. *Empire Untied Stevedores*, 936 F.2d 819 at 823, 25 BRBS at 26. Section 10(c) is also applicable where there is insufficient evidence in the record to make a determination of average daily wage under either 10(a) or 10(b). *Sproull*, 25 BRBS at 104; *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 140 (1990).

The objective of 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of injury. *Empire United Stevedores*, 936 F.2d 819, 823, 25 BRBS at 26. The administrative law judge has broad discretion in determining annual wage earning capacity under 10(c). *Sproull*, 25 BRBS at 105; *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). Actual earnings are not controlling. *Nat'l Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (9th Cir. 1979), *aff'g in relevant part* 5 BRBS 290 (1977). Thus, the amount actually earned by the claimant at the time of injury is a factor but is not the overriding concern in calculating wages under 10(c). *Empire Unties Stevedores*, 936 F.2d at 823, 25 BRBS at 26.

In this case, Claimant acknowledges that he did not work for the same employer for the year before he was injured, however, he contends that he worked for Ridgeway Cartage performing similar employment to the work he performed for Employer, and as a result, his average weekly wage should be calculated using 10(a). He claims his AWW may also be calculated under 10(b) by using the earnings of Mr. Hector Casias. Finally, Claimant contends that under 10(c), a "fair and just" AWW would range between $400 and $500.[14]

Employer/Carrier contend that Claimant's AWW cannot be ascertained through either 10(a) or 10(b) because there is insufficient evidence in the record. Employer asserts that Claimant's employment history is sporadic and points to Claimant's income tax returns, specifically, his 1997 return shows $8,526 as his

[14] Under 10(a), Claimant states his AWW would be $450. Under 10(b), and using Mr. Casias' earnings, Claimant states that 55 hours per week times $7.50 per hour plus 15 hours of overtime at $3.75 per hour would yield an AWW of $468.75. Claimant does not explain the range he offers for 10(c), but states that Claimant testified that he was promised he would earn more than the $6.50 he was earning if he went to work for Employer, and that he would receive overtime.

reported income. Employer argues that this number should be divided by 52 with a resultant AWW of $163.96, which Employer/Carrier claims is the best approximation of Claimant's earnings at the time of injury given his "sporadic work history."

I agree with Employer in that I find 10(c) to be the appropriate method for ascertaining Claimant's AWW. Section 10(a) is inapplicable. Though Claimant states he performed the same work for Ridgeway Cartage as he did for Employer, there is nothing in the evidence which states how long he worked for Ridgeway. The only information is Claimant's W-2 form which indicates that he earned $2306.96 from Ridgeway in 1997. There is no indication how many weeks he worked or when those weeks were. There is simply no substantial evidence indicating that Claimant worked in the same employment "substantially the whole of the year." Similarly, Section 10(b) is an inappropriate way to calculate Claimant's earnings. Mr. Ramirez, Claimant's supervisor, testified that Mr. Casias worked as a driver for a year, and that drivers typically worked an average of 55 hours per week, however, he did not know whether Mr. Casias earned $7.00 or $7.50 per hour. There were no payroll records submitted into evidence. Clearly, substantial evidence is not contained in the record upon which Claimant's AWW could be determined based on 10(b).

Accordingly, 10(c) is the appropriate method to ascertain Claimant's AWW. I do not agree with Employer's calculations, however. Employer assumes that the income represented on Claimant's W-2 forms from 1997 is the sole basis by which to determine his AWW. Using the W-2 forms alone is problematic in that, as already discussed, there is no indication for how long Claimant worked at Ridgeway Cartage. Further, Claimant only worked for Employer from May 19, 1997 to September 23, 1997, and the W-2 forms indicate that he earned much more from Employer than from Ridgeway, from which it can be inferred that he did not work long for Ridgeway. In fact, on his application for employment with Employer, Claimant indicated that he worked for Ridgeway from March 1997 to May 1997.

In order to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of injury, I find the best method, and the only one supported by the evidence, is to use Claimant's earnings from Employer as the basis for determining his AWW. The evidence indicates that Employer hired Claimant on May 19, 1997, he was injured on September 23, 1997, and did not return to work. Claimant's W-2 form from Employer indicates that he was

paid $6,219 for an average of four month's work. EX 13, p.11. Based on this evidence, I find that Claimant's AWW was $357.50. This figure is derived from Claimant's payroll records for thirteen weeks furnished by employer which indicate he worked 723.75 hours and earned $4,704.41. This results in an hourly wage of $6.50 per hour, and Claimant averaged 55 hours per week, yielding an average daily rate of $71.50, which in turn yields an AWW of $357.50.[15]

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). The filing of an answer to a state compensation claim does not constitute a notice of controversion and does not excuse the employer's liability under the Act. *Moore v. Paycor, Inc.*, 11 BRBS 483, 492 (1979). Although payments made under a state act do not excuse the failure to file a notice of controversion, where the employer makes payments and the claimant is ultimately awarded compensation in a greater amount under the Act, the employer's liability under Section 14(e) is based solely on the difference. *Spear v. Gen. Dynamics Corp.*, 25 BRBS 132, 136-37 (1991). In this instance, Employer controverted on June 19, 2000. Therefore, because Employer paid compensation under the state act but did not timely controvert, Section 14(e) penalties are assessed against Employer only based on the difference between compensation paid under the state scheme and that owed under the Act.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from September 23, 1997 until February 21, 2001, based on an average weekly wage of $357.50;

[15] Claimant worked 723.75 in 13 weeks and earned $4,704.41. ($4,704.41 divided by 723.75 equals $6.50 per hour, and 723.75 divided by 13 equals 55 hours per week). 55 hours at $6.50 per hour result in an average daily wage of $71.50 per day, and 357.50 per week.

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from February 21, 2001 until September 23, 2002, the date of maximum medical improvement of Claimant's back, based on an average weekly wage of $357.50 and diminished by a residual wage-earning capacity of $240.80; and additionally, commencing February 21, 2001, Employer/Carrier shall pay to Claimant compensation based on an average weekly wage of $357.50 for his 8% scheduled impairment of his knee, subject, of course, to the maximum rate of compensation allowable under Section 6(b) of the Act. This latter additional payment shall continue until the scheduled award has been paid in an amount equivalent to 23.04 weeks (8% of 288 weeks);[16]

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits for loss of wage earning capacity, from September 23, 2002 and continuing, based on the difference between the average weekly wage of $357.50 and adjusted residual wage-earning capacity of $240.80;

(4) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's neck and back injuries of September 23, 1997;

(5) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(6) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

[16] When a claimant suffers multiple injuries from one accident, his total compensation must not exceed two-thirds of the amount payable in the event of total disability. 33 U.S.C. § 908(a); *I.T.O. of Baltimore v. Green*, 185 F.3d 239, 243 (4th Cir. 1999); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The Board in *Padilla v. San Pedro Baot Works*, 34 BRBS 49 (2000), recognized that pursuant to *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419 *9th Cir. 1995), the administrative law judge may make "whatever adjustments" are necessary to prevent overpayment and affirmed the *Padilla* award of concurrent benefits. The rationale behind this award is to both prevent overpayment to Claimant while insuring that Claimant is fully compensated for both his knee and back injuries. Therefore, I will adopt the scheme set forth in *Padilla*; accordingly, Claimant's unscheduled benefits will be paid at the full partial compensation rate and the scheduled benefits will be paid in an amount equivalent to the difference between the maximum rate of compensation allowable under section 6(b) of the Act and the unscheduled benefits. In other words, beginning February 21, 2001, Claimant will receive his temporary partial disability award, as well as a portion of his scheduled award, not to exceed two-thirds of his average weekly wage.

(7) Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;[17]

(8) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(9) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 17th day of March, 2005**.**

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd

[17] See discussion on pages 48-49 regarding payment of state workers compensation.